Celcom (M) Bhd & Anor v Tan Sri Dato' Tajudin bin Ramli & Ors and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS D5–22–610 OF 2006 AND D1–22–1960 OF 2008
WONG KIAN KHEONG J
29 JUNE 2020

Evidence — Legally privileged communications — Admissibility of — Whether court could rely on O 33 r 3(1) and/or (2) of Rules of Court 2012 to adopt an appropriate procedure to resolve admissibility issue — Whether defendants could rely on alleged offence committed — Whether court could apply provisos (a) and/or (b) to s 126(1) of Evidence Act 1950 — Whether defendants had discharged burden under s 103 of Evidence Act 1950 — Evidence Act 1950 s 126(1) — Rules of Court O 33 r 3(1) & (2)

The plaintiffs in a suit claimed, among others, that the defendants had breached their fiduciary and statutory duties as directors of the plaintiffs regarding, among others, certain contracts and transactions. In another suit, the plaintiffs alleged that the defendants had conspired, either by lawful or unlawful means, to injure the plaintiffs and had thereby caused loss to the plaintiffs. The defendants had filed counterclaims against the plaintiffs and Telekom Malaysia Bhd ('TMB'). The defendants subsequently applied for and obtained a subpoena from the court to be served on Mr Ng Swee Kee ('Mr Ng'), Puan Putri Noor Shariza bt Noordin Omar ('Puan Putri') and Ms Jenny Chok ('Ms Chok'). Mr Ng and Puan Putri were two advocates and solicitors who were partners of the plaintiffs' firm ie Messrs Shearn Delamore & Co ('SDC'). Ms Chok was practicing in SDC and was acting for the first plaintiff in respect of the first plaintiff's acquisition of TM Cellular Sdn Bhd ('TMC') and TMB's take-over of the first plaintiff. The plaintiffs had placed on record that: (a) Mr Ng, Puan Putri and Ms Chok had been appointed to act for the first plaintiff in relation to the first plaintiff's acquisition of TMC and TMB's take-over ('the corporate exercises'); and (b) s 126(1) of the Evidence Act 1950 ('the EA') excluded the admissibility of any communication made between Mr Ng, Puan Putri and Ms Chok on the one part and the first plaintiff on the other part regarding the corporate exercises ('the legally privileged communications'). The defendant contended that proviso (a) and (b) to s 126(1) of the EA allowed the admissibility of legally privileged communications because, among others, the corporate exercises may constitute an offence under the then applicable s 32B(1)(aa), (bb) and/or (cc) read with s 32B(4) of the Securities Commission Act 1993.

Held:

(1) The court had exercised their discretion pursuant to O 33 r 3(1) and (2) of the Rules of Court 2012 ('RC') to hold a trial within a trial ('TWT') to determine the admissibility issue. There was no reason why the procedure for TWT in criminal cases should not apply in civil cases. Furthermore, neither principle nor policy consideration barred the court from exercising its discretion under O 33 r 3(1) and/or (2) of the RC to conduct a TWT to determine the admissibility of legally privileged communications (see paras 28 & 30).

(2) The first and second defendants could not rely on the alleged offence to invoke provisos (a) and (b) in the TWT. The reasons were: (a) the amended defence and counterclaim of the first and second defendants did not specifically plead the alleged offence; (b) the first and second defendants did not apply to the court to amend the amended defence and counterclaim so as to include the alleged offence; and (c) the plaintiffs had closed their case (see para 34).

(3) Proviso (a) could not apply to admit the legally privileged communications because: (a) there was no 'illegal purpose' regarding the corporate exercises; (b) there was no 'underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interest of justice' by any party regarding the corporate exercises; and (c) there was no proof of any communication which was made in furtherance of any illegal purpose concerning the corporate exercises. The first and second defendants could not rely on proviso (b) to admit the legally privileged communications because no crime and/or fraud had been committed regarding the corporate exercises. Additionally, the first and second defendants had failed to discharge the burden pursuant to s 103 of the EA. There was no evidence in the TWT to prove that Mr Ng, Puan Putri and Ms Chok had acted unlawfully, fraudulently and/or unethically regarding the corporate exercises. Therefore, the legally privileged communications could not be admitted in the actions and counterclaims (see paras 35–39).

[Bahasa Malaysia summary

Plaintif dalam satu tuntutan menuntut, antara lain, bahawa defendan telah melanggar tugas fidusiari dan undang-undang mereka sebagai pengarah plaintif mengenai, antara lain, kontrak dan transaksi tertentu. Dalam satu tuntutan lain, plaintif mendakwa bahawa defendan telah berkomplot, baik dengan cara yang sah atau tidak sah, untuk menjejaskan plaintif dan dengan itu telah menyebabkan kerugian kepada plaintif. Defendan telah mengemukakan tuntutan balas terhadap plaintif dan Telekom Malaysia Bhd ('TMB'). Defendan kemudiannya memohon dan memperoleh sapina dari mahkamah untuk disampaikan kepada Encik Ng Swee Kee ('Encik Ng'), Puan Putri Noor Shariza bt Noordin Omar ('Puan Putri') dan Cik Jenny Chok ('Cik Chok'). Encik Ng dan Puan Putri adalah dua peguambela dan peguamcara yang

merupakan rakan kongsi firma plaintif iaitu Tetuan Shearn Delamore & Co ('SDC'). Cik Chok beramal di SDC dan bertindak untuk plaintif pertama berkenaan dengan pemerolehan plaintif pertama TM Cellular Sdn Bhd ('TMC') dan pengambilalihan TMB terhadap plaintif pertama. Plaintif telah mencatat bahawa: (a) Encik Ng, Puan Putri dan Cik Chok telah dilantik untuk bertindak sebagai plaintif pertama berhubung dengan pemerolehan TMC dan pengambilalihan TMB ('pelaksanaan korporat'); dan (b) s 126(1) Akta Keterangan 1950 ('AK') mengecualikan penerimaan sebarang komunikasi yang dibuat antara Encik Ng, Puan Putri dan Cik Chok di satu pihak dan plaintif pertama di pihak lain mengenai pelaksanaan korporat ('komunikasi hak istimewa perundangan profesional'). Defendan berpendapat bahawa proviso (a) dan (b) kepada s 126(1) AK membenarkan penerimaan komunikasi hak istimewa perundangan profesional kerana, antara lain, pelaksanaan korporat mungkin merupakan suatu kesalahan di bawah s 32B(1)(aa), (bb) dan/atau (cc) dibaca bersama s 32B(4) Akta Suruhanjaya Sekuriti 1993.

Diputuskan:

(1) Mahkamah telah menggunakan budi bicara mereka menurut A 33 k 3(1) dan (2) Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk mengadakan perbicaraan dalam perbicaraan ('TWT') untuk menentukan isu penerimaan. Tidak ada sebab mengapa prosedur untuk TWT dalam kes jenayah tidak boleh berlaku dalam kes sivil. Selanjutnya, baik prinsip atau pertimbangan dasar melarang mahkamah menggunakan budi bicara di bawah A 33 k 3(1) dan (2) KKM untuk melakukan TWT untuk menentukan penerimaan komunikasi hak istimewa perundangan profesional (lihat perenggan 28 & 30).

(2) Defendan pertama dan kedua tidak boleh bergantung pada kesalahan yang didakwa untuk menggunakan proviso (a) dan (b) dalam TWT. Sebab-sebabnya adalah: (a) pembelaan dan tuntutan balas yang dipinda defendan pertama dan kedua tidak secara khusus memplid kesalahan yang didakwa; (b) defendan pertama dan kedua tidak memohon kepada mahkamah untuk meminda pembelaan dan tuntutan balas yang dipinda untuk memasukkan kesalahan yang didakwa; dan (c) plaintif telah menutup kes mereka (lihat perenggan 34).

(3) Proviso (a) tidak dapat diguna pakai untuk menerima komunikasi hak istimewa perundangan profesional kerana: (a) tidak ada 'tujuan haram' mengenai pelaksanaan korporat; (b) tidak ada 'perlakuan penipuan yang melanggar kewajipan suci hati atau bertentangan dengan dasar awam atau kepentingan keadilan' oleh mana-mana pihak mengenai pelaksanaan korporat; dan (c) tidak ada bukti adanya komunikasi yang dibuat untuk tujuan tidak sah mengenai pelaksanaan korporat. Defendan pertama dan kedua tidak boleh bergantung pada proviso (b) untuk menerima komunikasi hak istimewa perundangan profesional

kerana tidak ada jenayah dan/atau penipuan yang dilakukan mengenai pelaksanaan korporat. Tambahan lagi, defendan pertama dan kedua telah gagal melepaskan beban menurut s 103 AK. Tidak ada keterangan dalam TWT untuk membuktikan bahawa Encik Ng, Puan Putri dan Cik Chok telah bertindak secara tidak sah, secara fraud dan/atau tidak beretika mengenai pelaksanaan korporat. Oleh itu, komunikasi hak istimewa perundangan profesional tidak dapat diterima dalam tindakan dan tuntutan balas (lihat perenggan 35–39).]

Cases referred to

Barclays Bank plc and others v Eustice and others [1995] 4 All ER 511, CA (refd)
Gideon Tan v Tey Por Yee and another appeal [2017] 1 MLJ 352, CA (refd)
PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)
See Teow Chuan v Dato' Anthony See Teow Guan [1999] 4 MLJ 42, HC (refd)
Tan Chong Kean v Yeoh Tai Chuan & Anor [2018] 2 MLJ 669, FC (refd)
Toralf Mueller v ALCIM Holdings Sdn Bhd [2015] MLJU 779, HC (refd)

Legislation referred to

Evidence Act 1950 ss 3, 103, 122, 123, 124, 125, 126, 126(1), (1)(a), (1)(b)
Rules of Court 2012 O 18 r 8(1), (1)(b), O 20 rr 5(1), 8(1), O 33 r 3, 3(1), (2), O 34 r 2(2)(e)(i)
Securities Commission Act 1993 s 32B(1)(aa), (1)(bb), (1)(cc), (4)
Insolvency Act 1986 [UK] s 423

Rabindra S Nathan, Nad Segaram & Siew Huei Ira (Shearn Delamore & Co) in Suit No D5–22–610 of 2006 for the plaintiffs.
Lim Kian Leong (Tan Keng Teck, Janet Tang Yii Chi & Tobias Lim Koon Li with him) (Lim Kian Leong & Co) in Suit No D5–22–610 of 2006 for the first and second defendants.
Christopher Leong Sau Foo (Lim Tuck Sun & Ariel On Xiu Tao with him) (Chooi & Co and Cheang & Ariff) in Suit No D5–22–610 of 2006 for the fourth, fifth, seventh, eighth and ninth defendants.
Lambert Rasa-Ratnam (G Vijay Kumar & Chan Mun Yew with him) (Lee Hishammuddin Allen Gledhill) in Suit No D5–22–610 of 2006 in the counterclaim for TMB.
Rabindra S Nathan (Nad Segaram & Siew Huei Ira with him) (Shearn Delamore & Co) in Suit No D1–22–1960 of 2008 for the plaintiffs.
Lim Kian Leong (Tan Keng Teck, Janet Tang Yii Chi & Tobias Lim Koon Li with him) (Lim Kian Leong & Co) in Suit No D1–22–1960 of 2008 for the first and second defendants.
Christopher Leong Sau Foo (Lim Tuck Sun & Ariel On Xiu Tao with him) (Chooi & Co and Cheang & Ariff) in Suit No D1–22–1960 of 2008 for the fourth, fifth and sixth defendants.
Lambert Rasa-Ratnam (G Vijay Kumar & Chan Mun Yew with him) (Lee

Hishammuddin Allen Gledhill) in Suit No D1–22–1960 of 2008 in the counterclaim for TMB.

Wong Kian Kheong J:

BACKGROUND

[1] In Civil Suit No D5–22–610 of 2006 ('the first suit'), the plaintiff companies ('the plaintiffs') claimed, among others, that nine individual defendants had breached their fiduciary and statutory duties as directors of the plaintiffs regarding, among others, certain contracts and transactions ('first original action').

[2] The plaintiffs alleged in Civil Suit No D1–22–1960 of 2008 ('the second suit') that seven defendants had conspired, either by lawful or unlawful means, to injure the plaintiffs and had thereby caused loss to the plaintiffs ('second original action').

[3] Tan Sri Dato' Tajudin bin Ramli ('the first defendant') and Dato' Bistamam bin Ramli ('the second defendant') are the first and second defendants in the first and second suits ('two suits'). The first and second defendants have filed two counterclaims in the two suits ('two counterclaims') against the plaintiffs and Telekom Malaysia Bhd ('TMB'). The two counterclaims pleaded, among others, as follows:

(a) there was a 'Global Settlement' between:

  (i) the Malaysian government ('government') on behalf of, among others, plaintiffs; and

  (ii) the first defendant;

(b) the first defendant had complied with the global settlement by withdrawing all his claims and counterclaims in certain suits against, among others, government, Danaharta, Malaysian Airlines System, plaintiffs and Telekom Group of Companies;

(c) the plaintiffs had breached the global settlement by refusing to withdraw the two original actions;

(d) the plaintiffs and TMB had committed the tort of unlawfully interfering with the global settlement;

(e) the two original actions constituted a tort of abuse of court process because the two original actions had been brought by the plaintiffs maliciously, frivolously and/or vexatiously against the first and second defendants; and

A (f) the plaintiffs and TMB had committed a tort of conspiracy to cause loss to the first and second defendants.

[4] All the parties have consented for the two original actions and two counterclaims to be heard together.

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[5] The first and second defendants have applied for and obtained subpoenas from the court which have been duly served on two advocates and solicitors ('A&S') who are partners of the plaintiffs' firm, Messrs Shearn Delamore & Co ('SDC'), namely:

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(a) Mr Ng Swee Kee ('Mr Ng'); and

(b) Puan Putri Noor Shariza bt Noordin Omar ('Puan Putri').

D **[6]** Mr Ng and Puan Putri have applied to court to set aside their subpoenas. I have dismissed these applications — please see [2018] 1 AMR 745. This decision has been affirmed by the Court of Appeal ('CA's decision'). Mr Ng and Puan Putri did not succeed to obtain leave of the Federal Court to appeal against CA's decision.

E

[7] The trial of the two suits commenced and the plaintiffs have closed their case in support of the two original actions and their defence against the two counterclaims The first and second defendants then opened their case (case (first and second defendants)). After the first and second defendants had given their evidence, their learned lead counsel, Mr Lim Kian Leong, then informed the court that the first and second defendants would call Mr Ng and Puan Putri to give evidence for the case (first and second defendants) so as to:

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(a) oppose the two original actions; and

G (b) support the two counterclaims

[8] The first and second defendants subsequently applied for and obtained a subpoena from the court to be served on Ms Jenny Chok ('Ms Chok'). At the material time, Ms Chok was practicing in SDC and was acting for the first plaintiff in respect of the first plaintiff's acquisition of TM Cellular Sdn Bhd ('TMC') and TMB's take-over of the first plaintiff ('TMB's take-over'). The subpoena was duly served on Ms Chok.

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I **[9]** The plaintiffs' learned lead counsel, Mr Rabindra S Nathan, had placed on record as follows:

(a) Mr Ng, Puan Putri and Ms Chok had been appointed to act for Celcom (M) Bhd ('first plaintiff') in relation to the first plaintiff's acquisition of TMC and TMB's take-over (corporate exercises); and

(b) s 126(1) of the Evidence Act 1950 ('the EA') excludes the admissibility of any communication made between Mr Ng, Puan Putri and Ms Chok on the one part and the first plaintiff on the other part regarding the corporate exercises ('legally privileged communications').

[10] Mr Lim has contended that proviso (a) to s 126(1) of the EA ('proviso (a)') and/or proviso (b) to s 126(1) of the EA ('proviso (b)') allow(s) the admissibility of legally privileged communications because, among others, the corporate exercises may constitute an offence under the then applicable s 32B(1)(aa), (bb) and/or (cc) read with s 32B(4) of the Securities Commission Act 1993 ('the SCA').

ISSUES

[11] The following questions arise in respect of the admissibility of legally privileged communications in the two original actions and two counterclaims (admissibility issue):

(a) what is the scope of privilege conferred by s 126(1) of the EA and the exceptions provided in provisos (a) and (b)? In this regard:

(i) whether the phrase 'illegal purpose' in proviso (a) includes:

(1) 'fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interest of justice' as stated by our Court of Appeal in *Gideon Tan v Tey Por Yee and another appeal* [2017] 1 MLJ 352; and

(2) iniquity as laid down by United Kingdom's (UK) Court of Appeal in *Barclays Bank plc and others v Eustice and others* [1995] 4 All ER 511; and

(ii) whether proviso (b) is confined to an A&S who has actual knowledge of the commission of a crime or fraud since the commencement of the A&S's employment and does not include the following circumstances:

(1) 'wilful blindness' of the A&S;

(2) A&S's recklessness in failing to make such inquiries as an honest and reasonably competent A&S would have made;

(3) knowledge of circumstances which would indicate the commission of a crime or fraud to an honest and reasonably competent A&S; and

(4) knowledge of circumstances which would put an honest and reasonably competent A&S on inquiry as to whether a crime or fraud has been committed since the commencement of the A&S's employment;

(b) what is the procedure to decide the admissibility issue? There are three options which may be adopted by the court (three options), namely:

(i) the court may conduct a voir dire or 'trial within a trial' ('TWT') to determine the admissibility issue;

(ii) when Mr Ng, Puan Putri and Ms Chok give their evidence, Mr Rabindra may then object to their evidence premised on s 126(1) of the EA. Upon such an objection, parties may make their submission and the court shall thereafter make an immediate ruling on the admissibility issue ('second option'); or

(iii) Mr Ng, Puan Putri and Ms Chok may complete their testimonies (without the court hearing any objection by Mr Rabindra and without any submission from the parties) and the court then reserves its decision on the admissibility issue until the conclusion of the trial of the two suits at which stage:

(1) all parties may present their submission on the admissibility issue as well as their post-trial submission on the two original actions and two counterclaims ('post-trial submission'); and

(2) the court shall determine on the admissibility issue before a decision is made by the court on the merits of the two original actions and two counterclaims ('third option').

In this respect, can the court rely on O 33 r 3(1) and (2) of the Rules of Court 2012 ('the RC') to adopt an appropriate procedure to resolve the admissibility issue?

(c) can the first and second defendants rely on an alleged offence committed by the first plaintiff under s 32B(1)(aa),(bb) and/or (cc) read with s 32B(4) of the Securities Commission Act 1993 ('alleged offence') to admit the legally privileged communications under provisos (a) and/or (b)? and

(d) have the first and second defendants discharged the burden under s 103 of the EA to satisfy the court that the legally privileged communications are admissible in the two suits pursuant to provisos (a) and/or (b)?

SCOPE OF S 126(1) OF THE EA, PROVISOS (A) AND (B)

[12] Section 126 of the EA provides as follows:

126 Professional communications

(1) *No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment*:

Provided that nothing in this section shall protect from disclosure —

(a) *any such communication made in furtherance of any illegal purpose*;

(b) *any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.*

(2) *It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.*

Explanation — The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an advocate: 'I have committed forgery and I wish you to defend me.' As the defence of a man known to be guilty is not a criminal purpose this communication is protected from disclosure.

(b) A, a client, says to B, an advocate: 'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.' This communication being made in furtherance of a criminal purpose is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an advocate, to defend him. In the course of the proceedings B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure. (Emphasis added.)

[13] It is decided in *Toralf Mueller*, at (75(b) and (e)–(h)), as follows:

[75] *My understanding of ss 126(1) and 129 EA is as follows*:

...

(b) *s 126(1) EA provide that the following 3 matters are legally privileged and cannot be adduced as evidence —*

(i) *any communication made by a client to his or her A&S, cannot be disclosed by the A&S*;

(ii) *an A&S shall not state the contents or condition of any document with which the A&S has become acquainted in the course and for the purpose of the A&S's professional employment; and*

(iii) *an A&S shall not disclose any advice given by the A&S to his or her client in the course and for the purpose of the A&S's professional employment.*

...

(e) the EA, despite its name, is a code of law which is intended to be comprehensive — the Privy Council's opinion delivered by Lord Diplock in an appeal from Malaysia, *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 at 90. *As s 126(1) EA has expressly provided for the 3 Exceptions to s 126(1) EA, there cannot be any Common*

Law or equitable exception to legal privilege. Any Common Law or equitable exception to legal privilege is not only inconsistent with the clear words of s 126(1) EA but will also erode the general rule of legal privilege provided in s 126(1) EA;

(f) *in view of the importance of legal privilege provided by s 126(1) EA, the 3 Exceptions to s 126(1) EA should be strictly construed. Any wide interpretation of the 3 Exceptions to s 126(1) EA may undermine, if not rendered redundant, the general rule of legal privilege*;

(g) *a party claiming legal privilege under s 126(1) EA in respect of a piece of evidence, has the initial burden to satisfy the court concerning the application of such a legal privilege. If this initial burden is discharged, the legally privileged evidence must be excluded unless the opposing party is able to satisfy the court regarding the application of one or more of the 3 Exceptions to s 126(1) EA*;

(h) *in deciding whether a piece of evidence is legally privileged or otherwise under s 126(1) EA, the court should peruse such evidence to ascertain whether legal privilege attaches to such evidence and if such evidence is legally privileged, whether any one or more of the 3 Exceptions to s 126(1) EA applies to admit such evidence* ... (Emphasis added.)

[14] After *Toralf Mueller*, Richard Malanjum CJ (Sabah and Sarawak) (as he then was) had decided as follows in the Federal Court case of *Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669 at paras [28]–[29] and [37]–[38]:

[28] *The rationale in the principle is to enable and protect an individual's ability to access to the justice system with complete disclosure of all necessary information to his legal adviser free from any hindrance in the form of fear that any disclosure by him of any communication may prejudice him in the future.*

[29] *The courts regard client legal privilege as a 'substantive general principle which plays an important role in the effective and efficient administration of justice by the courts'* (see *Goldberg v Ng (1995) 185 CLR 83*).

...

[37] *The next issue is whether such a breach is actionable by an aggrieved client? In this case the use and disclosure of the information was for the benefit of the defendants. Learned counsel for the defendants submitted that the plaintiff has no cause of action under s 126. It merely enables him to lodge a complaint with the relevant disciplinary body.*

[38] *With respect, we are not inclined to agree with learned counsel for the defendants. Section 126 is not a mere rule of evidence. It is a principle of fundamental justice. Surely a breach of such principle entitles an aggrieved party to commence an action including a prayer for an injunction to safeguard the confidentiality of the client-solicitor communication. It is even more critical when such confidential communication is used to the advantage of the solicitors who are legally obliged to protect it. Hence, the principle of law as submitted by learned counsel for the plaintiff is the correct proposition of law on this issue.* (Emphasis added.)

[15] In view of *Tan Chong Kean* which has decided that legal professional privilege in s 126(1) of the EA is a 'principle of fundamental justice', provisos

(a) and (b) should be strictly construed so as not to undermine this principle of fundamental justice. A

[16] In *Gideon Tan*, at paras [32] and [35]–[36], Zawawi Salleh JCA (as he then was) delivered the following judgment of the Court of Appeal: B

> [32] *The exception to the legal professional privilege finds its modern origin in R v Cox and Railton* (1884) 14 QBD 153 *was summarised by Longmore LJ in Kuwait Airways Corpn v Iraqi Airways Co* [2005] 1 WLR 2734 *as being that if a person consults a solicitor in furtherance of a criminal purpose then, whether or not the solicitor knowingly assists in the furtherance of such purpose, the communications between the client and the solicitor do not attract legal professional privilege. The principle is not confined to criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interest of justice*. C
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> [35] *In our view, a communication is privileged if it is made to a legal adviser by client after the commission of a crime and with a view to his defence; but it is not privilege it if is made before the commission of a crime or wrong and for the purpose of being guided or assisted in furthering or committing it. This is very clear from the illustrations to s 126* D
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> [36] *In our view, on the factual matrix of these appeals, the exception for communication and/or information from a client pertaining to a future crime does not apply here for the following reasons*:
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> (a) *the communication and/or information has no nexus to any criminal activity*; and F
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> (b) *even if it did, all the impugned averments and exhibits were in relation to past matters and this was not a case of seeking advice on a future unlawful act*. (Emphasis added.)

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[17] Firstly, s 126(1) of the EA provides for three categories of legally privileged communications ('three categories') as follows:

(a) any communication made by a client to an A&S;

(b) the contents and condition of any document with which the A&S has become acquainted in the course and for the purpose of the A&S's professional employment; and H

(c) advice given by the A&S to the A&S's client in the course and for the purpose of the A&S's professional employment. I

[18] If the evidence in question falls within any one or more of the three categories, there is privilege unless one of the following three exceptions apply:

(a) as stated in s 126(1) of the EA, the client has expressly consented to the

disclosure of the legally privileged communications by the A&S — *Tan Chong Kean* at paras [26] and [43]–[47];

(b) the communication between a client and A&S is made in furtherance of an 'illegal purpose' as provided in proviso (a).

According to *Gideon Tan*, proviso (a) only applies to communication which takes place *before* the commission of the 'illegal purpose' and the communication is made 'in furtherance of' the illegal purpose.

The Court of Appeal has decided in *Gideon Tan* that the phrase 'illegal purpose' in proviso (a) is not confined to criminal purposes but 'extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interest of justice'.

With respect, I am of the following view regarding the ambit of the phrase 'illegal purpose' in proviso (a):

(i) proviso (a) should be construed strictly so as not to undermine legal professional privilege in s 126(1) of the EA as a 'principle of fundamental justice' — please see the Federal Court's judgment in *Tan Chong Kean*;

(ii) if the phrase 'illegal purpose' in proviso (a) is given a strict interpretation, this phrase includes (not an exhaustive list):

(1) crimes;

(2) fraud;

(3) breach of any mandatory requirement of written law;

(4) breach of fiduciary duty; and

(5) breach of statutory duty.

If the scope of 'illegal purpose' in proviso (a) is too wide, I am afraid that this will unnecessarily undermine the general application of legal professional privilege in s 126(1) of the EA;

(iii) based on a strict construction of proviso (a), 'illegal purpose' in proviso (a) cannot include 'underhand conduct' which:

(1) does not fall within any one of the above sub-paras (b)(i)–(b)(v); and

(2) is 'contrary to public policy or the interest of justice'.

It is to be noted that in *Gideon Tan*, the Court of Appeal has held that the evidence in question constitutes legally privileged communications which is to be excluded because proviso (a) does not apply in that case. Hence, the dictum expressed in *Gideon Tan* regarding the meaning of 'illegal purpose' in proviso (a) is merely obiter. Furthermore, *Gideon Tan* is decided before the Federal Court

case of *Tan Chong Kean*; and

(iv) Mr Lim has relied on Schiemann LJ's decision in *Barclays Bank* which has applied the 'Principle of Iniquity' to admit legally privileged communications in UK. It is decided in *Barclays Bank* at pp 522–524, as follows:

> *The first main submission made by Mr Morgan was based on the decision of Scott J in Arbuthnot Leasing International Ltd v Havelet Leasing Ltd [1991] 1 All ER 591; [1992] 1 WLR 455. In that case Scott J was prepared to accept that an intention to put a debtor's assets out of the reach of a creditor was not necessarily a dishonest motive but held that even so it could suffice for the purposes of s 423. Mr Morgan relied on this and went on to submit that the case law had in effect confined the possibility of lifting the privilege to cases where there was dishonesty.*
>
> *I reject this submission. Scott J was not concerned with whether legal professional privilege should be lifted. His use of the word 'dishonest' was not in that context. In any event he was merely indicating that he was prepared to accept something which he did not need to decide and which had been submitted by the losing party. Moreover, as I have indicated, various words other than 'dishonest' have been used in the course of the cases in which privilege has been in issue. However, to me the most important consideration is that we are here engaged not in some semantic exercise to see what adjective most appropriately covers the debtor's course of conduct but in deciding whether public policy requires that the documents in question are left uninspected ...*
>
> *... For reasons given earlier in this judgment we start here from a position in which, on a prima facie view, the client was seeking to enter into transactions at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require that communications between him and his solicitor in relation to the setting up of these transactions be discoverable.* (Emphasis added.)

Firstly, *Barclays Bank* was a case where the UK court had ordered discovery of legally privileged communications between the defendants and their solicitors because the defendants had entered into undervalue transactions which unlawfully defeated the interest of the defendants' creditor bank ('bank). The bank had applied to court in *Barclays Bank* for, among others, declarations under s 423 of the UK's Insolvency Act 1986 ('the IA (UK')) that the undervalue transactions were void. It is clear that the legally privileged communications in *Barclays Bank* has been made in furtherance of an illegal purpose, namely to defeat the bank's legitimate interest as a creditor of the defendants and such unlawful transactions can be remedied by a court order under s 423 of the IA (UK).

Secondly, our EA, despite its name, is a code of law which is intended to be comprehensive — please see the Privy Council's opinion delivered by Lord Diplock on an appeal from Malaysia, *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 at p 90. UK has no statutory provision which is identical or similar to our s

126 of the EA. I am reluctant to apply cases from jurisdictions which have no legislation which is identical or similar to our written law, especially codified ones (such as s 126 of the EA); and

(c) proviso (b) applies as follows:

(i) A&S has been retained to act for a client; and

(ii) in the course of A&S's employment, A&S has 'observed' any 'fact' which shows a 'crime or fraud' has been committed since the commencement of the A&S's employment. 'Fact' is defined widely in s 3 of the EA as follows —

> *'fact' means and includes —*
>
> (a) *any thing, state of things or relation of things capable of being perceived by the senses*;
>
> (b) *any mental condition of which any person is conscious;*
>
> ILLUSTRATIONS
>
> (a) That there are certain objects arranged in a certain order in a certain place is a fact.
>
> (b) That a man heard or saw something is a fact.
>
> (c) That a man said certain words is a fact.
>
> (d) *That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.*
>
> (e) That a man has a certain reputation is a fact; (Emphasis added.)

EA does not provide a meaning of the word 'observed' in s 126(1) of the EA. It is clear that proviso (b) applies when the A&S has *actual knowledge* of the commission of a crime or fraud after the commencement of the A&S's employment.

According to s 126(2) of the EA, it is immaterial whether the attention of the A&S is directed or otherwise to the 'fact' (which shows the commission of any crime or fraud) by or on behalf of A&S's client. Based on s 126(2) of the EA, I am of the view that proviso (b) applies in the following three circumstances:

(i) when an A&S intentionally closes his or her eyes to any 'fact' which shows the commission of a crime or fraud after the commencement of the A&S's employment (*wilful blindness*). Wilful blindness is also known as 'Nelsonian knowledge', 'wilful ignorance' and 'contrived ignorance';

(ii) when an A&S is reckless and fails to make such inquiries as an honest and reasonably competent A&S would have made regarding the commission of a crime or fraud after the commencement of the A&S's

employment (r*ecklessness*); and

(iii) when an A&S has knowledge of circumstances which would indicate the commission of a crime or fraud after the commencement of the A&S's employment to an honest and reasonably competent A&S (*knowledge of circumstances*).

I opine that proviso (b) applies in respect of an A&S's wilful blindness, recklessness and knowledge of circumstances because in these circumstances, the commission of a crime or fraud after the commencement of the A&S's employment is clear, if not obvious, to an honest and reasonably competent A&S. If proviso (b) does not apply to an A&S's wilful blindness, recklessness and knowledge of circumstances, this may allow, if not emitalen, an unscrupulous A&S to abuse legal professional privilege when a crime or fraud has been committed after the commencement of the A&S's employment. When there exists A&S's wilful blindness, recklessness and knowledge of circumstances, it is contrary to justice and public policy for legal professional privilege to be accorded under s 126(1) of the EA.

I am *not* in favour of applying proviso (b) when there is knowledge of circumstances which would put an honest and reasonably competent A&S on inquiry regarding whether a crime or fraud has been committed since the commencement of the A&S's employment (*duty to inquire*). To apply oroviso (b) when an A&S has a duty to inquire may unnecessarily widen the ambit of proviso (b) which then undermines legal professional privilege in s 126(1) of the EA. Furthermore, it may be difficult, if not impossible, to ascertain the circumstances and the timing which would put an honest and reasonably competent A&S on inquiry and even if such circumstances arise, what is the nature and content of the query which should have been asked of the client by an honest and reasonably competent A&S.

WHETHER EVIDENCE IS LEGALLY PRIVILEGED AND IS A 'FACT IN ISSUE' OR 'RELEVANT FACT'

[19] Firstly, the court has to decide whether the evidence in question (evidence) falls within any one or more of the three categories. If the evidence does not fall within any one of the three categories, the evidence is not legally privileged under s 126(1) of the EA and is:

(1) admissible provided that the Evidence constitutes:

(a) a 'fact in issue' (defined in s 3 EA as 'any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows') (Fact In Issue); or

(b) a fact which is declared by EA as relevant, namely a fact which is relevant under ss 6 to 55 EA (contained in Chapter 2 EA which is entitled

'Relevancy of Facts') (Relevant Fact). According to s 3 EA, 'one fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the [EA] relating to the relevancy of facts'; or

(2) not admissible if the Evidence is neither a Fact In Issue nor a Relevant Fact.

[20] If the evidence:

(a) falls within any one or more of the three categories; and

(b) constitutes a fact in issue or relevant fact,

— the court has to consider what is the appropriate procedure to decide the admissibility of the evidence.

[21] The court has a discretion to peruse the evidence to ascertain whether the evidence falls within any one or more of the three categories and is either a fact in issue or relevant fact — *Toralf Mueller*. For this purpose, the party applying for the admissibility of the evidence is not entitled to peruse the evidence. This is to ensure that the privilege is not lost before the court decides on the admissibility of the evidence.

HOW TO DECIDE ADMISSIBILITY ISSUE?

[22] I reproduce below O 33 r 3 of the RC:

O 33 r 3 *Determining mode of trial*

(1) In every action begun by writ, an order made at the pre-trial case management shall determine the mode of trial; and any such order may be varied by a subsequent order of the Court made at or before the trial.

(2) In any such action, different questions or issues may be ordered to be tried by different modes of trial and one or more questions or issues may be ordered to be tried before the others. (Emphasis added.)

[23] In the High Court case of *See Teow Chuan v Dato' Anthony See Teow Guan* [1999] 4 MLJ 42 at p 45, James Foong J (as he then was) held a TWT to determine the admissibility of legally privileged communications. There is however no discussion in *See Teow Chuan* on the court's discretionary power to decide what is the appropriate procedure to resolve the admissibility issue.

[24] I have decided in *Toralf Mueller v ALCIM Holdings Sdn Bhd* [2015] MLJU 779 at para [75(i)], as follows:

[75] ...

(i) *the court has a discretion to hold a 'trial within a trial' (voir dire) to ascertain the admissibility of a piece of evidence which is alleged to be legally privileged … In this case, I had exercised my discretion not to hold a 'trial within a trial' as the admissibility of*

evidence whereby legal privilege had been claimed by the Petitioner, could be easily decided based on the evidence adduced in this case and the parties' submission. (Emphasis added.)

[25] Mr Lim has submitted that a TWT should not be held in these two suits to decide the admissibility issue. Mr Lim has advanced the following grounds to support this contention:

(a) the legally privileged communications concern documents which have already been filed in court and which have been categorised by all parties in the two suits as 'Part B documents' within the meaning of O 34 r 2(2)(e)(i) of the RC (Part B Documents). This means that all the parties have agreed to the authenticity of Part B Documents and the parties are only disputing the contents of Part B Documents. In view of the Part B Documents, according to Mr Lim, it is 'unnecessary' and 'redundant' to hold a TWT to determine the admissibility issue; and

(b) the conduct of a TWT will delay the disposal of the two suits and increase costs unnecessarily.

[26] As stated in *Toralf Mueller*, the court has a discretion to adopt which of the three options is appropriate to decide the admissibility issue. Such a judicial discretion is clear from O 33 r 3(1) and (2) of the RC as follows:

(a) pursuant to O 33 r 3(1) of the RC, the court may make any 'subsequent order ... at .... the trial' regarding the appropriate procedure to determine the admissibility issue; and/or

(b) the court may decide under O 33 r 3(2) of the RC that 'different questions or issues may be ordered to be tried by different modes of trial'. In other words, the court may exercise its discretion conferred by O 33 r 3(2) of the RC to adopt any one of the three options to resolve the admissibility issue.

[27] In these two suits, there is no dispute that the evidence which Mr Lim seeks from Mr Ng, Puan Putri and Ms Chok falls within all the three categories. I also accept Mr Lim's submission that the legally privileged communications is relevant to the two original actions and two counterclaims The question that now arises is the appropriate procedure for this court to decide the admissibility issue.

[28] I have exercised my discretion pursuant to O 33 r 3(1) and (2) of the RC to hold a TWT to determine the admissibility issue. Such an exercise of discretion is premised on the following reasons:

(a) the admissibility issue cannot be resolved solely based on Part B Documents. Oral evidence needs to be adduced regarding the application of provisos (a) and/or (b) ('need for oral evidence'). This case is unlike *Toralf Mueller* (a suit for relief for a shareholder of a company who has been treated unjustly by the other shareholders of the company) where the admissibility of legally privileged communications can be easily decided based on affidavits, cross-examination of deponents and submission of learned counsel;

(b) the first and second defendants had applied for a copy of SDC's legal opinion regarding the corporate exercises (SDC's legal opinion). Understandably, such an application had been strenuously objected to by Mr Rabindra. The need for oral evidence is accentuated by the application for SDC's legal opinion by the first and second defendants;

(c) the two original actions and two counterclaims raise many issues of law and fact regarding events which have taken place over a long period of time. Hence, all the parties have adduced lengthy witness statements in support of their cases. Cross-examination of witnesses in these two suits have been detailed and extensive. So far, the notes of proceedings (NOP) have been voluminous and the trial of the two suits has yet to be concluded. In these circumstances, if I have adopted the third otion, the voluminous evidence which is relevant to the two original actions and two counterclaims (relevant evidence (two suits)) will be 'merged' in the NOP with evidence which is relevant to the admissibility issue (relevant evidence (admissibility issue)). After the trial of the two suits, it is a 'monumental' task for learned counsel and court to sieve the relevant evidence (admissibility issue) from the relevant evidence (two suits) in the NOP. In such an event, the risk of confusion is real;

(d) if I have applied the second option, this will unduly delay the disposal of the two suits. Every time Mr Rabindra objects to the admissibility of the testimonies of Mr Ng, Puan Putri and Ms Chok based on s 126(1) of the EA, the parties will have to submit on the admissibility issue and I have to decide on the particular objection. The second option has another disadvantage. The parties and court can only decide on the admissibility issue on a particular piece of evidence of Mr Ng, Puan Putri and Ms Chok which is objected to by Mr Rabindra. It is in the interest of justice for all the parties to adduce relevant evidence (admissibility issue) and thereafter the court can duly consider all the evidence tendered in a TWT before determining the admissibility issue; and

(e) if a TWT is held to resolve the admissibility issue, the need for oral evidence is fulfilled in the interest of justice. All the parties can adduce relevant evidence (admissibility issue) in the TWT as they see fit. There will not be any confusion with the relevant evidence (two suits) and court can then decide the admissibility issue in the TWT (court's

decision (TWT)). All the parties may then conduct the remainder of the trial of the two suits and draft their post-trial submission premised on, among others, the court's decision (TWT). A

CONDUCT OF TWT B

[29] After I have decided to adopt the third option, for the benefit of all learned counsel in the two suits, I outline the following procedure for the conduct of a TWT in the two suits:

(a) the trial in the two suits is immediately suspended and can only be resumed after the court's decision (TWT); C

(b) the first and second defendants have alleged particular facts, namely the legally privileged communications are admissible under provisos (a) and/or (b). Hence, the first and second defendants have the burden under s 103 of the EA to prove the admissibility of legally privileged communications. Section 103 of the EA provides as follows: D

> s 103 *Burden of proof as to particular fact*
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person*. (Emphasis added.) E

As the onus is on the first and second defendants to satisfy the court regarding the admissibility of legally privileged communications, they have to commence their case in TWT (TWT case (first and second defendants)) by calling witnesses (TWT witnesses (first and second defendants)) and have them examined-in-chief by Mr Lim; F

(c) TWT witnesses (first and second defendants) may be cross-examined by all the other parties in the two suits even though a particular party may not have objected to the admissibility of legally privileged communications. After the cross-examination of TWT witnesses (first and second defendants), they may be re-examined by Mr Lim; G

(d) after the first and second defendants have closed their TWT case (first and second defendants), all the other parties in the two suits may present their evidence to support or oppose the admissibility of legally privileged communications. Once again, a witness who is called by a party (X) in a TWT: H

(i) has to be examined-in-chief by X's learned counsel; I

(ii) may be cross-examined by learned counsel for all the other parties in the two suits; and

(iii) may be re-examined by X's learned counsel;

(e) as the sole purpose of the TWT is to determine the admissibility issue, parties can only adduce evidence in the TWT provided that such evidence is relevant to the admissibility issue. If a piece of evidence is relevant to the two original actions or two counterclaims but is not relevant to the admissibility issue, such evidence cannot be tendered at the TWT;

(f) after all the parties in the two suits have been given a right to adduce relevant evidence (admissibility issue), the parties can then submit, orally and/or in writing, on the admissibility issue;

(g) the court's decision (TWT) should be made expeditiously as the trial of the two suits is held in abeyance pending the disposal of the TWT. Any delay in the disposal of the TWT will inevitably delay the disposal of the two suits;

(h) all evidence tendered in a TWT cannot be used in the two suits. If a party intends to rely on the testimony of a witness (Y) given in a TWT for the purpose of the two suits, the party should call Y in the trial of the two suits. This is because the purpose of TWT is solely confined to the admissibility issue whereas the two suits concern the merits of the two original actions and two counterclaims; and

(i) before the court's decision (TWT) is made, the court has a discretion to peruse the legally privileged communications to ascertain whether provisos (a) and/or (b) applies. Needless to say, the party who applies for the admissibility of legally privileged communications (Z), is not entitled to peruse such evidence before the court makes a decision to admit or not such evidence at the conclusion of a TWT. This is to ensure that the privilege is not lost in the event the court holds that the legally privileged communications is not admissible after a TWT has been held; and

(j) if the court admits the legally privileged communications, the court has a discretion to redact the document containing the legally privileged communications (unredacted document) so as to exclude contents of the unredacted document which are not relevant to the case at hand (redaction). The court has a discretion to allow or disallow Z to inspect the unredacted document before the redaction is carried out.

[30] The above procedure for TWT is based on TWT's conducted in criminal cases. I see no reason why the procedure for TWT in criminal cases should not apply in civil cases. Furthermore, I am of the view that neither principle nor policy consideration bars the court from exercising its discretion under O 33 r 3(1) and/or (2) of the RC to conduct a TWT to determine the admissibility of the following evidence (other than legally privileged communications):

(a) marital privilege (s 122 of the EA);

(b) 'affairs of State' privilege (s 123 of the EA);

(c) 'official communications' privilege (s 124 of the EA); and

(d) privileged information concerning commission of offences (s 125 of the EA).

[31] In this TWT, the first and second defendants have called the following four witnesses ('four witnesses') to testify:

(a) Mr Ng;

(b) Puan Putri;

(c) Ms Chok; and

(d) Encik Bazlan bin Osman (Encik Bazlan).

[32] Upon the close of TWT case (first and second defendants), all the other parties in the two suits had informed the court that they would not be calling any witness to testify in the TWT. I then directed written submission to be filed by all parties regarding the admissibility issue. The following parties have filed written submission in this TWT:

(a) the plaintiffs;

(b) the first and second defendants; and

(c) TMB.

CAN THE FIRST AND SECOND DEFENDANTS RELY ON ALLEGED OFFENCE IN TWT?

[33] Mr Lim has relied on the alleged offence to support the application of provisos (a) and (b) in this TWT.

[34] I am of the view that the first and second defendants cannot rely on the alleged offence to invoke provisos (a) and (b) in the TWT. My reasons are as follows:

(a) the amended defence and counterclaim of the first and second defendants (ADC (first and second defendants)) did not specifically plead the alleged offence. I reproduce below O 18 r 8(1) of the RC:

> O 18 r 8 *Matters which shall be specifically pleaded*
>
> *(1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —*

A (a) *which he alleges makes any claim or defence of the opposite party not maintainable*;

(b) *which, if not specifically pleaded, might take the opposite party by surprise*; *or*

(c) *which raises issues of fact not arising out of the preceding pleading.* (Emphasis added.)

B

The reliance by the first and second defendants on the alleged offence in the TWT has clearly taken the plaintiffs and TMB by surprise within the meaning of O 18 r 8(1)(b) of the RC;

C (b) before the commencement of the TWT, the first and second defendants had previously applied in court encl no 170 ('encl 170') to, among others, amend the ADC (first and second defendants). The proposed amendments to the ADC (first and second defendants) did not allude to the alleged offence. I have refused encl 170 with costs — please refer to [2017] AMEJ 1009 (HC's decision (encl 170)). The HC's decision (encl 170) has been affirmed by the Court of Appeal (CA's decision (encl 170)). The application of the first and second defendants to the Federal Court for leave to appeal against CA's decision (encl 170) has been dismissed with costs (FC's decision (encl 170)).

D

E

The first and second defendants did not apply to the court under O 20 rr 5(1) and 8(1) of the RC to amend the ADC (first and second defendants) so as to include the alleged offence. Even if such an application is made, this court may not have acceded to this application in view of the FC's decision (encl 170); and

F

(c) the plaintiffs have closed their case. Mr Rabindra has also completed his cross-examination of the first and second defendants. If I have allowed the first and second defendants to raise the alleged offence in TWT at the advanced stage of this trial and assuming the legally privileged communications is held to be admissible after the TWT, there will be irreparable prejudice to the plaintiffs.

G

WHETHER THE COURT CAN APPLY PROVISOS (A) AND/OR (B) IN THIS TWT

H

[35] I have perused the lengthy evidence of the four witnesses given in the TWT. I am satisfied that proviso (a) cannot apply to admit the legally privileged communications because:

I (a) there is no 'illegal purpose' regarding the corporate exercises as I cannot find any evidence of:

(i) a criminal offence;

(ii) fraud;

(iii) breach of any mandatory requirement of written law;

(iv) breach of a fiduciary duty; and

(v) breach of a statutory duty

— which has been committed by any person in relation to the corporate exercises;

(b) even if 'illegal purpose' in proviso (a) includes any 'underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interest of justice' (as stated in *Gideon Tan*), there is no such conduct by any party regarding the corporate exercises; and

(c) there is no proof of any communication between Mr Ng, Puan Putri and Ms Chok on the one part and the first plaintiff and Encik Bazlan on the other part which is made in furtherance of any illegal purpose concerning the corporate exercises.

[36] I have no hesitation to find as a fact in this TWT that the first and second defendants cannot rely on proviso (b) to admit the legally privileged communications. This factual finding is premised on the following evidence and reasons:

(a) no crime and/or fraud has been committed regarding the corporate exercises since the commencement of the employment of Mr Ng, Puan Putri and Ms Chok as A&S's for the first plaintiff; and

(b) no 'fact' (as widely defined in s 3 of the EA) has been 'observed' by Mr Ng, Puan Putri and Ms Chok in the course of their employment which shows that a crime and/or fraud has been committed in relation to the corporate exercises since the commencement of their employment as A&S's for the first plaintiff. In particular, I find as a fact as follows:

(i) Mr Ng, Puan Putri and Ms Chok have no actual knowledge of the commission of any criminal offence and/or fraud in respect of the corporate exercises since the commencement of their employment as A&S's for the first plaintiff;

(ii) there is no wilful blindness, recklessness and knowledge of circumstances on the part of Mr Ng, Puan Putri and Ms Chok which can trigger the application of proviso (b) concerning the corporate exercises since the commencement of their employment as A&S's for the first plaintiff; and

(iii) Mr Ng, Puan Putri and Ms Chok have no knowledge of circumstances which would put an honest and reasonably competent A&S on inquiry regarding whether a crime and/or fraud has been committed in relation to the corporate exercises since the commencement of their employment as A&S's for the first

plaintiff. Accordingly, Mr Ng, Puan Putri and Ms Chok have no duty to inquire concerning the corporate exercises.

[37] Additionally or alternatively, I am of the view that the first and second defendants have failed to discharge the burden pursuant to s 103 of the EA to satisfy this court that provisos (a) and/or (b) can be invoked to admit the legally privileged communications in these two suits.

[38] I must add that there is no evidence in the TWT to prove that Mr Ng, Puan Putri and Ms Chok have acted unlawfully, fraudulently and/or unethically regarding the corporate exercises. It must be emphasised that Mr Ng, Puan Putri and Ms Chok leave this court with their good reputation intact.

THE COURT'S DECISION (TWT)

[39] Premised on the evidence of the four witnesses and the reasons stated above, the legally privileged communications cannot be admitted in the two original actions and two counterclaims

[40] I order two sets of costs of the TWT to be paid by the first and second defendants to:

(a) the plaintiffs; and

(b) TMB.

I did not award any costs of the TWT to the defendants in the two suits (other than the first and second defendants) because they did not support or oppose the admissibility of the legally privileged communications in the TWT.

[41] In closing, I must express my gratitude to Mr Rabindra, Mr Lim and Mr Lambert Rasaratnam (learned lead counsel for TMB) for their helpful submission, without which this judgment is not possible.

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh